

IN THE SUPREME COURT OF THE STATE OF ALASKA

ALASKA PUBLIC DEFENDER  
AGENCY,

Applicant,

v.

Supreme Court No. S-\_\_\_\_\_

ALASKA COURT OF APPEALS,

Respondent.

Trial Case No. 3AN-11-13926CR and 3AN-14-082520CR  
Court of Appeals No. A-13597 and A-13598

**EMERGENCY MOTION FOR STAY OF BRIEFING DEADLINES ORDERED BY  
COURT OF APPEALS**

**VRA AND APP. R. 513.5 CERTIFICATION**

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court. I further certify, pursuant to App. R. 513, that the font used in this document is Arial 12.5 point.

**INTRODUCTION**

After granting nonroutine extensions to file the opening briefs in Carlton Donnelly's two pending appeals beyond the 390 days provided by Standing Order No. 12, the Alaska Court of Appeals denied the Alaska Public Defender Agency's request for further nonroutine extensions and ordered the agency to file the briefs by November 5, 2021. Because the agency had requested further nonroutine extensions because it needed the additional time to complete the work necessary in the cases and cannot comply with the deadlines ordered by the court, it asked the court to permit its withdrawal. On November 3, the court denied the agency's

request, maintained its denial of the agency's request for additional extensions, and ordered the agency to file the two opening briefs on November 5.<sup>1</sup>

The agency is docketing an original application with this court, and it will file its substantive application by November 13, asking this court to review the court of appeals' order.<sup>2</sup> It asks this court to stay the briefing deadlines ordered by the court of appeals pending resolution of the agency's original application.

### COUNSEL OF RECORD

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Counsel for the Alaska Court of Appeals is:

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<sup>1</sup> Chief Judge Allard did not participate in the decision. Judges Harbison and Terrell issued the majority order denying the agency's request for withdrawal and again denying the agency's request for additional extensions, and Judge Wollenberg dissented from the agency's request for additional extensions.

<sup>2</sup> Appellate Rule 404 does not provide a time in which an original application must be filed. See Alaska R. App. P. 404(b). November 13 is 10 days after the court of appeals distributed its order. Cf. Alaska R. App. P. 403(a)(1) (setting 10-day deadline for filing petition for review from trial court order); Alaska R. App. P. 404(c) (providing respondent to original application 10 days in which to file response).

## NOTICE TO OPPOSING COUNSEL

The agency will serve opposing counsel by email. It will also serve the agencies involved in the litigation in the court of appeals – the Office of Criminal Appeals and the Office of Public Advocacy – by email.

### THE NATURE OF THE EMERGENCY AND THE DATE BY WHICH A DECISION IS NEEDED

The court of appeals has ordered the agency to file its opening briefs in Mr. Donnelly's two cases by November 5, 2021. The agency, therefore, asks this court to rule on its motion by November 5, 2021.<sup>3</sup>

### GROUND FOR REVERSAL TO BE RAISED IN THE ORIGINAL APPLICATION

Carlton Donnelly has two cases before the Alaska Court of Appeals – A-13597, an appeal of a 2011 case in which he was convicted of third-degree weapons misconduct and fourth-degree controlled substances misconduct, and A-13598, an appeal of a 2014 case in which he was convicted of third-degree assault, second- and fourth-degree controlled substances misconduct, and felony failure to stop. The trial court sentenced Mr. Donnelly in both cases at a joint hearing in January 2020, and Mr. Donnelly timely filed notices of appeal in both cases.

After receiving the maximum extension permitted under Standing Order No. 12,<sup>4</sup> the agency asked the court of appeals for a 150-day extension, or until

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<sup>3</sup> Because of the filing holiday resulting from the court's early closure on Fridays, the agency has until November 8 to comply with the court's order. See Supreme Court Order No. 1875 (amended Mar. 9, 2021). A ruling by November 5 will allow the agency to take appropriate action on November 8, if necessary.

<sup>4</sup> These extensions resulted in deadlines of June 8, 2021 (A-13597) and June 30, 2021 (A-13598).

November 5, 2021, to file the opening brief in A-13597, which the court granted. And the agency asked the court for a 128-day extension, or until November 5, 2021, to file the opening brief in A-13598, explaining that the case was a companion case to A-13597 and that both cases needed to be assigned to the same lawyer so that the lawyer could determine whether consolidation was appropriate.

Sharon Barr entered her appearance in both of Mr. Donnelly's cases on June 28, 2021, and the court denied the motion for an extension in A-13598 in part on July 15, 2021. The court explained that the extension request did not comply with the mandates of Standing Order No. 12 as "the press of ordinary business was not intended to qualify as an 'extraordinary and unforeseeable circumstance.'" The court ordered that the opening brief be filed by September 27, 2021.

At the time Ms. Barr entered her appearance in Mr. Donnelly's cases, she had two cases awaiting the filing of an opening brief, *DeSimone v. State*, A-13515, and *Sadowski v. State*, A-13445. *DeSimone* is an appeal of a first-degree murder conviction; it has 1,837 pages of transcript and 1,322 pages of record. Ms. Barr filed her opening brief in that case on July 15, 2021.

Ms. Barr entered her appearance in *Sadowski* on May 14, 2021, and at the time of her entry, the opening brief was due on August 31, 2021. *Sadowski* is an appeal of a first-degree murder conviction; it has 1,467 pages of transcript and 1,016 pages of record. Because of her obligations in other cases and scheduled leave, Ms. Barr requested an additional 45-day extension and filed the opening brief in that case on October 15.

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2 In July 2021, the agency had six child welfare cases needing  
3 assignment. Given the workloads of the section's lawyers, which included three child  
4 welfare cases assigned to section lawyers the month before, the agency assigned  
5 one of those cases, *G.T. v. State*, S-18115, to Ms. Barr.<sup>5</sup> Ms. Barr entered her  
6 appearance on July 26, 2021, and she filed the opening brief in that case on  
7 September 3, 2021.  
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9 After she entered her appearance in Mr. Donnelly's cases, Ms. Barr  
10 also filed reply briefs in *L.C. v. State*, S-18002 (July 1, 2021), a child welfare appeal,  
11 and *Fawcett v. State*, A-13433 (August 10, 2021). In July, Ms. Barr provided a  
12 week's coverage for the agency's Ketchikan office, which had no staff lawyers at the  
13 time, and she was on leave for one week in August. Ms. Barr also provided regular  
14 advice to the agency's trial lawyers, consulted with and provided editing to the  
15 agency's appellate lawyers, and began her annual work hiring the agency's interns  
16 and externs.  
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18 On September 27, 2021, Ms. Barr filed additional extension requests in  
19 Mr. Donnelly's two cases. [Att. A] She detailed the work she had completed since  
20 she entered her appearance in June, and she explained the need to review both of  
21 Mr. Donnelly's cases for potential consolidation.<sup>6</sup> She asked the court of appeals to  
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25 <sup>5</sup> The appellant's brief notice in *G.T.* was issued on July 23, 2021, and it  
26 set a briefing deadline of August 12, 2021. *G.T.* has a 363-page transcript and 532  
pages of record.

27 <sup>6</sup> Ms. Barr pointed out that, together, Mr. Donnelly's two cases had over  
28 1,800 pages of transcript. Additionally, the record in A-13597 is 1,130 pages, and  
the record in A-13598 is 1,112 pages.

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2 extend the deadlines in both cases to December 30, 2021, but she noted that  
3 because of the uncertainty regarding consolidation, she might require additional  
4 time.

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6 On October 1, 2021, the court rejected Ms. Barr's requests. [Att. B]  
7 While acknowledging Ms. Barr's diligence, this court maintained the existing  
8 deadline of November 5, 2021, in A-13597, and it extended the deadline in A-13598  
9 to November 5 to allow Ms. Barr to review Mr. Donnelly's cases together.

10 In response to the court's denial, the agency filed a motion asking the  
11 court to permit to its withdrawal. [Att. C] The agency explained that, given the  
12 workload presented by Mr. Donnelly's cases and the time available under the court's  
13 order, the deadline was nearly impossible to meet. It added that attempting to meet  
14 the court's deadline would create a concurrent conflict of interest with Ms. Barr's  
15 other clients and that no other staff lawyer could meet the court's deadline without  
16 similarly creating a concurrent conflict of interest. Finally, the agency stated that it  
17 did not have a contract lawyer available that could meet the court's deadline. It  
18 requested that, if the court did not grant the time Ms. Barr believed was necessary  
19 to complete the opening briefs, it permit the agency to withdraw.

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21 After the state filed an opposition to the agency's motion [Att. D], the  
22 court of appeals invited the Office of Public Advocacy (OPA) to respond. [Att. E]  
23 After receiving OPA's response [Att. F], the court denied the agency's motion to  
24 withdraw, and a majority of the court again denied the agency's motion for an  
25 extension of time. [Att. G] The court concluded that, if the agency was experiencing  
26 excessive caseloads, those issues had to be addressed at the outset of the  
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2 representation, not at the later stage of Mr. Donnelly's cases. It also concluded that,  
3 because the agency's caseload issues are systemic, it should not address those  
4 issues in an individual case.

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6 The dissent agreed that permitting the agency to withdraw would not  
7 serve Mr. Donnelly or address the problem of appellate delay. [Att. G] But it  
8 recognized the progress the agency has made in reducing its criminal appellate  
9 backlog, and it acknowledged the challenges the agency has faced resulting from  
10 "a significant influx" of child welfare appeals. The dissent said that it would grant Ms.  
11 Barr's requests but noted that it "would be unlikely to grant future extension requests  
12 of this nature and would also consider sanctions against the Agency for failing to  
13 meet future briefing deadlines."

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15 The issues presented by the court of appeals' order justify a stay of the  
16 November 5 briefing deadlines.<sup>7</sup> As the agency explained in its motion to withdraw,  
17 its ethical obligations require it to provide competent representation to its clients; it  
18 also has a constitutional obligation to provide quality representation. [Att. C]  
19 Standards governing defense representation in criminal appeals provide that  
20 competent and constitutional representation requires appellate counsel to "consider  
21 all issues that might affect the validity of the judgment of conviction and sentence,  
22 including any that might require initial presentation in a trial court" and to "consider  
23 raising on appeal even issues not objected to below or waived or forfeited, if in the  
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27 <sup>7</sup> Cf. *State v. Galvin*, 491 P.3d 325, 333 (Alaska 2021) (stating that  
28 preliminary injunction appropriate where party seeking injunction makes clear  
showing of probable success on the merits).

best interests of the client.”<sup>8</sup> An appellate defender is to “examine the record and the relevant law” and only then “provide counsel’s best professional evaluation of the issues that might be presented on appeal.”<sup>9</sup> This evaluation includes advice “about the probable and possible outcomes and consequences of a challenge to the conviction or sentence.”<sup>10</sup>

These standards also explain that a criminal appeal is client-driven, directing a lawyer to present an appeal, if able to do so without misleading the court, even when the decision to proceed with a non-frivolous appeal is made against the advice of counsel.<sup>11</sup> A lawyer “should also discuss with the client the arguments to be presented in appellate briefing and at argument, and should diligently attempt to accommodate the client’s wishes,” working with the client to reach an agreeable resolution about colorable claims the client wants to raise.<sup>12</sup>

As Ms. Barr explained in her motions requesting additional time, she had not yet reviewed the transcripts and record in Mr. Donnelly’s cases, the first step in preparing an opening brief for filing. [Att. A] In its order denying the agency’s motion to withdraw, the court correctly assumed “that the Agency is currently prioritizing the briefs in Donnelly’s cases” following Ms. Barr’s filing of an opening

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<sup>8</sup> CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION § 4-9.2(b) (Am. Bar Ass’n 2017).

<sup>9</sup> *Id.* at § 4-9.2(c).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at § 4-9.2(f).

<sup>12</sup> *Id.* at § 4-9.2(g).



brief in another case on October 15. [Att. G, H] But given the nature of the Mr. Donnelly's two cases, the 15 working days between October 15 and November 5 are insufficient to allow the agency to comply with both the court's deadlines and its ethical and constitutional obligations to Mr. Donnelly.<sup>13</sup> That is, the court's order requires the agency to violate its ethical and constitutional obligations to Mr. Donnelly.

### CONCLUSION

Because the court's order requires the agency to file two opening briefs in violation of its ethical and constitutional obligations to Mr. Donnelly, the agency respectfully asks this court to stay the briefing deadlines pending resolution of this application. The agency will file its original application by November 13, 2021.

ALASKA PUBLIC DEFENDER AGENCY

DATE November 4, 2021

Renee McFarland  
RENEE MCFARLAND (0202003)  
DEPUTY PUBLIC DEFENDER

<sup>13</sup> Indeed, Ms. Barr has filed a motion asking the court of appeals to unseal portions of the record for her review. See Motion for Order to Allow Appellate Defense Counsel to Review Audio Recordings of Sealed Representation Hearings, *Donnelly v. State*, A-13598 (Oct. 28, 2021). The court of appeals has not yet ruled on this request. [Att. H]